

05-938 JAN 23 2006

No. 05 _____

~~CONFIDENTIAL~~

**In the
Supreme Court of the United States**

JENNY WERNING, CHARLES BINGAMAN
and TROY CANNON,

Petitioners,

v.

ODELL THOMPSON, JR.,

Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's decision in this case conflicts with the settled precedent of this Court and/or conflicts with settled rules of law of other Circuit Courts of Appeal.

2. Whether the Seventh Circuit erred in extinguishing plaintiffs' claim for declaratory relief on grounds of qualified immunity.

3. Whether it was "clearly established" as of December 5, 2000, for purposes of determining qualified immunity, that the First Amendment bars State officials from requiring special permission before their employees are permitted to communicate with any "external agent" or the head of the agency for which the employees work, regarding their agency's policies and operations.

4. Whether the First Amendment bars State officials from retaliating against employees for requesting to speak to their superiors.

5. Where public employees have requested an opportunity to speak with the official or manager who supervises their employment, whether the official or manager has a duty to make a reasonable inquiry as to the nature of their concerns before retaliating against said employees.

6. Whether the rule that arguments not raised at the district court level are deemed waived at the appellate level applies where the argument is raised by an *appellee* in response to an argument substantively raised for the first time on appeal by the appellant.

PARTIES TO THE PROCEEDINGS BELOW

The parties before this Court are:

Plaintiff-Petitioner Jenny Wernsing,

Intervening-Plaintiffs-Petitioners Charles Bingaman and
Troy Cannon, and

Defendant-Respondent Odell Thompson, Jr.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable, as none of the petitioners are
non-governmental corporations.

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INTRODUCTORY STATEMENT

Petitioners Jenny Wernsing, Charles Bingaman and Troy Cannon hereby petition this court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 423 F. 3d 732 (7th Circuit 2005). The Order denying the Petitions for Rehearing and Rehearing En Banc is reported at 2005 U.S. App. LEXIS 23342 (7th Cir. Ill., Oct. 25, 2005). The Order of the United States District Court for the Central District of Illinois that granted Plaintiff's and Intervening Plaintiffs' Motion for Partial Summary Judgment, and that granted in part and denied in part Defendant's Motion for Summary Judgment, is reported at 286 F. Supp. 2d 983 (C.D. Ill. 2003).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 9, 2005. The Order of the United States Court of Appeals for the Seventh Circuit denying Plaintiff's and Intervening Plaintiffs' Petition for Rehearing and Rehearing En Banc was entered on October 25, 2005. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Basis for jurisdiction in the district court: The claims at issue in this cause were brought pursuant to 42 U.S.C. §§ 1983 and 1988 and the First Amendment to the United States Constitution. The basis for jurisdiction was 28 U.S.C. §§ 1331 and 1343 (a)(3) and the aforesaid statutory provisions.

The plaintiffs, Petitioners herein, served as Internal Security Investigators II (ISI 2s) in the Office of the Inspector General (OIG) in the Illinois Department of Human Services (DHS). The OIG is responsible for investigating reports of abuse and neglect of the mentally ill and developmentally disabled persons who receive DHS services. It is undisputed in this case that the work of ISI 2s is vitally important to the welfare of some of the most vulnerable members of society and naturally touches on matters of the gravest public concern. All ISI 2s report to a designated Team Leader, who reports to the appropriate Bureau Chief, who in turn reports to the Deputy Inspector General or the Inspector General. The Inspector General, in turn, reports to the Secretary who heads DHS.

Defendant Odell Thompson, Jr. became the Inspector General of the DHS on July 1, 2000. On or about November 27, 2000, Thompson received an e-mail from five employees in the OIG's Southern Bureau, including plaintiffs Wernsing, Bingaman and Cannon, which stated:

Several investigators in the Southern Bureau have some concerns we wish to discuss with you as soon as possible. These concerns are relative as to who we understand you are going to appoint as the Southern Bureau Chief. These concerns are very important and need your attention before any appointment is made.

Defendant received the e-mail but did not respond to it. On November 30, 2000, Thompson received another e-mail from the same five employees, stating in relevant part:

We contacted you on 11/27/00 asking that you meet with us and discuss our serious concerns over who we understand to be the tentative selection for Bureau Chief. We have not heard from you. We once again ask that you meet with us. We would like if at all possible to keep this matter in house out of respect for the chain of command and in keeping with respect for your position. However, if we are not afforded this opportunity we will feel compelled to air our concerns to the Secretary [i.e., the head of DHS] or those at the legislative level.

Again, defendant did not respond to the request for a meeting and made no inquiries into the basis for the e-mail. The "concerns" referenced in the two e-mails stemmed from information indicating that defendant was going to appoint Ron Fuentes as Bureau Chief of the OIG Southern Bureau. Each of the plaintiffs had worked with Fuentes when he had

previously served as Bureau Chief, and they had concerns about his ability to manage the Bureau arising from that experience. They alleged that Fuentes' lack of competence as a manager had caused a large backlog of investigations, staffing shortages and delays in OIG investigations, including an extreme delay in a case involving the death of a patient. The backlog in investigations was particularly troubling, since any delay in investigating cases of neglect or abuse could compromise the investigators' ability to gather information or could render grievances against offending DHS employees time-barred under Illinois law.

On or about December 5, 2000, Defendant sent a letter to the five e-mail signatories that stated, in relevant part:

The Office of Inspector General staff are not authorized to communicate about Office of Inspector General policies or operations directly to the Secretary [head of the DHS], to the press, or to any external agent except with my prior knowledge and approval.

This directive was repeated in a second communication sent to *all* employees in the OIG in January, 2001. Defendant later testified that there was nothing other than the two e-mails from the plaintiffs that led him to issue the December 5 directive and that his concern was that he "didn't want to be sabotaged in some way" because he "just didn't know what their motives were." He admitted that he didn't make any effort to ascertain what those motives were. It is undisputed that the release of confidential information by OIG employees and contacts with the press were already governed by both statute and internal DHS rules.

In March 2001, Thompson attended a meeting of the Southern Bureau staff where he finally met with the plaintiffs